

# APPELLATE ADVOCACY FOR PROSECUTORS

November 16, 2018  
Maricopa County Security Building  
Phoenix, Arizona



## TIPS AND CONSIDERATION FOR WRITING BRIEFS

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Distributed by:

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## Tips and Considerations for Writing Briefs

APAAC Appellate Advocacy for Prosecutors  
Seminar  
November 16, 2018

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## Goals and Principles

### Explain and Persuade

- Give the court everything it needs to make the necessary rulings and write the opinion
- Briefs are persuasive, not objective
- Apply law to facts
- Address opposing arguments squarely

### Responsible, Professional Advocacy

- Maintain character and credibility
- Fair interpretation, reasonable application
- Maintain consistency with your agency's positions

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## Goals and Principles

### Ethical Considerations

- ER 1.1. Competence
- "A lawyer shall provide competent representation to a client.
- Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

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## Goals and Principles

### Ethical Considerations

- ER 1.13. Diligence
- "A lawyer shall act with reasonable diligence and promptness in representing a client."
- "A lawyer must also act with commitment and dedication to the interests of the client." [Cmt. 1]
- "A lawyer's work load must be controlled so that each matter can be handled competently." [Cmt. 2]
- "Perhaps no professional shortcoming is more widely resented than procrastination." [Cmt. 3]

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## Goals and Principles

### Ethical Considerations

- ER 3.1. Meritorious Claims and Contentions
- "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a good faith basis in law and fact for doing so that is not frivolous, which may include a good faith and nonfrivolous argument for an extension, modification or reversal of existing law.
- A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless defend the proceeding as to require that every element of the case be established."

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## Goals and Principles

### Ethical Considerations (Continued):

- Advocate has a duty to use legal procedure for fullest benefit of the client's cause, but also a duty not to abuse legal process [Cmt. 1]
- Lawyers required to inform themselves about the facts of their clients' cases, applicable law, and determine they can make good faith and nonfrivolous arguments
- "Such action is not frivolous even though the lawyer's position believes that the client's position ultimately will not prevail." [Cmt. 2]

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## Goals and Principles

- Ethical Considerations (Continued):
  - ER 3.2. Expediting Litigation
- “A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.”
- “Delay should not be indulged merely for the convenience of the advocates, or for the purpose of frustrating an opposing party’s attempt to obtain rightful redress or repose.” [Cmt. 1]

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## Goals and Principles

- Keep your audience in mind
  - Judges
    - Your brief is their first exposure to this case
    - Write a brief that the court can readily adapt to opinion form
  - Law clerks
    - Your brief may be their first exposure to the issue(s)
  - Opposing counsel
    - Preempt counterarguments with unassailable logic and controlling authority
    - Don’t personalize or antagonize

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## Resources

- Consult style manuals and other references:
  - *The Elements of Style* (Strunk & White)
  - *The Redbook: A Manual of Legal Style* (Bryan Garner)
  - *The Winning Brief* (Bryan Garner)
  - *The Gregg Reference Manual* (William A. Sabin)
  - *Plain English for Lawyers* (Richard C. Wydick)

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### Begin By Reading the Opening Brief with a Critical Eye

- Read the entire opening brief
- Take no representations for granted
  - Common “red flags”
  - Case citation lacks pin cite
  - Factual representation lacks record cite
  - Writer relies on overstatement rather than authority, e.g., “clearly,” “obviously,” “it’s beyond peradventure”
- Examine the premise
  - Don’t merely attack the conclusion

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### Outline Before Writing

- “Design informs even the simplest structure, whether of brick and steel or of prose.” Strunk & White at 70-71.
- Outlining is a time-saving investment
  - Helps avoid repetition
- Begin affirmatively (why we win) and then tell the court why defendant loses
- Ordering your arguments
  - Start with strongest argument followed by alternative arguments

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### Outlining (cont.)

- Possible exception: dispositive arguments first, such as waiver, jurisdiction
- Don’t rely on ordering in OB
  - Decide on the best, most logical order
- Headings track issue statements, both in order and language
- Incorporate standards of review and harmlessness arguments

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## Using Legal Authority

- **Begin with primary authority**
  - Constitution, statutes, rules of procedure
- **Find relevant case law, then prioritize it:**
  - USSC, your circuit/state, out-of-circuit/state, lower courts
  - Tip: begin with narrow searches, then broaden. Published circuit/state opinions invariably cite the controlling/relevant USSC cases.
  - ARIZ, CTA9, CTA, ALLFEDS, ALLSTATES
- **Cite judiciously**
  - If you find one dispositive case on point, stop

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## Using Legal Authority (cont.)

- **Use best case first -- and come back to it**
  - Courts want assurance that a controlling case dictates the outcome
- **Begin discussion with the critical holding or proposition for which you cite it**
  - Avoid discussions of facts (except to distinguish) or the history of how the point developed

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## Using Legal Authority (cont.)

- **Discuss the law precisely and accurately**
  - Never rely on a head note
  - Always supply a pin cite
  - Don't call it a "holding" unless it's a holding
  - Distinguish majority/concurring/dissenting opinions
  - Those red flags can be important ...
  - Don't overstate or overreach
- **Tie the legal discussion to cited, record facts**
  - Begin with general principles, then apply them
  - Example: If you're discussing the *Leon* good faith exception, point out *Leon's* core principle – Unless suppression deters misconduct, it's merely punitive

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## Some Related Principles

- Argue affirmatively, not defensively
  - Effective use of legal authority follows the principle that we argue affirmatively.
  - Explain the ruling below and why it is correct under the controlling authority. Then address the flaws and errors in the appellant's argument.
    - Affirmative arguments largely subsume contrary arguments.
  - Avoid a series of paragraphs that begin: "Appellant asserts \_\_\_\_\_. Appellant is incorrect."

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## Consider Oral Argument

- Keep in mind that you may have to defend any statement at oral argument
- If unsure, consult with supervisors
- The best brief you write is the one you would have written *after* oral argument
- Keep your reader – the judge -- in mind

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## Incorporate Standard of Review

- Argue in terms of the applicable standard. Compare:
  - "The court did not err in admitting evidence of the car chase to show consciousness of guilt."
  - "The court appropriately exercised its discretion in admitting evidence of the car chase to show consciousness of guilt."
- Don't just recite the standard. Define it, then weave it into the argument.
- Take advantage of favorable standards

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## One Size Does Not Fit All

### Approaches to drafting differ with the type of issue

- Claims of insufficient evidence require fact-intensive inquiries, relating specific testimony and exhibits to each element of proof
- *De novo* review of purely legal issues requires attention to analysis by other courts and forceful logic in support of a favorable interpretation

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## Responding to Misstatements

### First, consider whether to respond

- Is it material to the analysis or the outcome? If not, responding to it may only distract the reader

### Then, consider how to respond

Text or footnote?

Choose appropriate language. Compare:

"Opposing counsel falsely states that the AUSA made no effort to produce the FBI 302 report."

- "Although the opening brief suggests otherwise, the AUSA made a diligent but unsuccessful attempt to obtain the lost FBI 302 report."
- "The AUSA diligently tried to obtain the lost FBI 302 report. See Response to Dismissal Motion, ER 341."

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## Argument Headings

### Use them to advance your position

- If your headings are clear and explanatory, readers understand the argument before they read any of the text.

### Tip: Use "because" to force explanation

Examples:

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## Argument Headings (cont.)

### Compare

THE TRIAL COURT ACTED WITHIN ITS DISCRETION BY DENYING DEFENDANT'S MOTION TO SUPPRESS HIS STATEMENTS ON *MIRANDA* GROUNDS.

### with

THE TRIAL COURT ACTED WITHIN ITS DISCRETION BY DENYING DEFENDANT'S MOTION TO SUPPRESS HIS STATEMENTS ON *MIRANDA* GROUNDS **BECAUSE** DEFENDANT VOLUNTARILY SPOKE TO POLICE AND WAS NOT IN CUSTODY.

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## Argument Headings (cont.)

- Complexity of case and structure of argument determine where to use subheadings
- The more specific, the more persuasive
  - Avoid "generic" headings/subheadings, e.g. "The District Court Did Not Abuse Its Discretion"
  - Judges often refer back to the table of contents
- Frame headings affirmatively
  - **Compare** "The court acted within its broad discretion ..." **with** "The court did not abuse its discretion ..."

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## Dealing With Adverse Authority

- If you ignore bad law, it will not go away
  - Acknowledge it and explain why it does not result in an adverse decision
- Common approaches to overcoming adverse authority (in no particular order)
  - Distinguish it
  - Determine it has been overruled or criticized
  - Reveal it as the weaker side in a split of authority
  - Identify its faulty reasoning
- Discuss favorable authority first

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## Dealing With Adverse Authority

### Ethical Considerations

- ER 3.3. Candor Toward the Tribunal
- A lawyer shall not knowingly:
  - Make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
  - Fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel [.]
  - 3.3 duties continue until the proceeding concludes (ER 3.3(c))

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## Elements of Brief Writing Style

- Some of Strunk & White's "principles of composition" have a particularly strong impact on the argument section of an appellate brief:
  - Structuring paragraphs properly
  - Using active voice
  - Omitting needless words
  - Putting statements in positive form
  - Choosing definite, concrete, specific language

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## Topic Sentences & Transitions

- Topic sentences make the argument easier to read and understand. Their absence tires and challenges the reader.
- Topic sentences announce what will follow – briefs are not mystery novels.
- In editing, insert missing topic sentences

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## Topic Sentences (cont.)

- Issue: Are Arizona's capital-sentencing statutes unconstitutional because they fail to sufficiently narrow the class of defendants eligible for death?
- Several Arizona Supreme Court cases address this issue.
- Compare** "In *State v. Greenway*, this Court first considered whether Arizona's capital-sentencing scheme was constitutionally infirm for containing too many aggravating factors. This Court concluded that the statute was constitutional. In *State v. Hidalgo*, this Court revisited the issue, again rejecting the argument that Arizona's capital-sentencing statutes contain too many aggravating factors and thus fail to narrow the class of defendants eligible for death."
- With** "This Court has repeatedly rejected Defendant's argument that Arizona's death-penalty statutes are not sufficiently narrowing" *State v. Hidalgo*, 241 Ariz. 543 (2017); *State v. Greenway*, 170 Ariz. 185 (1991). [Then use the rest of the paragraph to describe the Court's reasoning]

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## Choosing Powerful Language

- Don't adopt loaded defense language
  - "Billy suffered a conviction in the 2003 case."
  - "A jury convicted Smith of mail fraud in 2003."
- Avoid "cop speak"
  - Compare** "The vehicle exited an outbuilding adjacent to the subject's residence."
  - With** "The car pulled out of Smith's garage."
- Avoid legalese (particularly Latin)
  - "In the case **sub judice** ..."
  - "**Comes now** the United States ..."
  - Under *Miranda* **and its progeny** ..."

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## Choosing Powerful Language (cont.)

- Avoid acronyms and abbreviations if possible
  - If you must use an acronym or abbreviation, spell out the full term the first time you use it, then identify the acronym or abbreviation in parenthesis.
  - E.g. "Defendant alleged ineffective assistance of counsel (IAC)."
- Use active voice
  - Identifies the actor; clarifies the meaning; usually shortens the sentence.
  - Compare:**
    - "An interview was conducted."
    - "The defendant was interviewed."
    - "Detective Smith interviewed the defendant."

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## Setting Appropriate Tone

- Be respectful. Avoid personalization, sarcasm, condescension, exaggeration
  - Afford dignified treatment to the defendant, counsel, judge, witnesses and others
- A respectful tone may go unnoticed, but a disrespectful tone never does
- Usually the most appropriate tone for an answering brief is "matter-of-fact"
  - Understatement can be highly effective
- Would a disinterested third person feel that your brief treats the defendant fairly?

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## Block Quotes

- Use them sparingly and judiciously
- Helpful when OB has made a point based on a statement taken out of context
- Provide an effective introduction
  - "To the contrary, the court specifically addressed defendant's 'assimilation' argument at the sentencing hearing:"
- When quoting from opinions, use ellipses and omit unnecessary citations and quotation marks

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## Block Quotes (cont.)

- Double space between paragraphs/ sections/speakers
- Retain original paragraphing conventions (indents)
- Consider 1.2 line spacing (block quotes tend to be hard to read with normal 1.0 single spacing)

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## Footnotes

- Judges' perceptions of footnotes differ
  - We recommend:
    - 1. Using them sparingly
    - 2. Not using them to supply case citations
  - Guidelines:
    - Does the analysis require this point?
    - Can you understand the argument without it?
  - One appropriate common use:
    - Supplying relevant definitions & language
- Example:** Text refers to a procedural rule, footnote supplies the applicable language in the rule.

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## Diagrams and Photographs

- Use diagrams, charts, exhibits, summaries, timelines, photos, etc. where:
  - It is difficult to convey the meaning verbally
  - It reduces the word count
  - It simplifies or lends context to a complicated fact pattern or a complex series of transactions

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## Diagrams and Photographs (cont)




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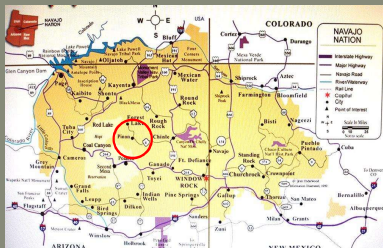
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## Diagrams and Photographs (cont)




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## Editing and Time Management

- Go ahead and vent – in the *first* draft.
- Briefing demands time and attention
  - Close your door. Turn off your telephone.
- Resolve deadline conflicts in advance
- Leave “walkaway” time in your schedule
- Do meaningful, thorough self-editing
  - Spell checking is not proofreading
  - Proofreading is not editing
- Omit needless words. Shorten your brief so the judge will read it first.

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## Research

- Read the opening brief before you begin
- Read the cases cited in the opening brief
- You remain responsible for finding, citing and applying the correct law
- Trouble finding a case?
  - Use Westlaw brief banks
  - Treatises, Guidelines Handbook, Georgetown Law Journal Annual Review of Crim. Procedure
  - Ask your supervisor or others in your agency
  - Contact the AGO

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### Summary of Argument

- Write the summary at the end
  - Leave time – this is not an easy part of the job
- Make it succinct, clear and accurate
  - Suggestion: one paragraph for each issue
- Use colorful, plain English
  - Engage the readers and make them want to read the argument (like watching a movie trailer)
- Consider how you would describe the case to a colleague
- Readers often go right to the summary – on first read and right before argument

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### Summary of Argument (cont.)

- Focus primarily on why we win (not the defects in the defendant's arguments)
- Try to keep the summary to one page
- Avoid footnotes and case citations
- Tie in the most salient facts
- Cover only critical aspects of your argument
- Remember: "Easy reading is damned hard writing."

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